No. 93-639 (13)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

SILVIA S. IBANEZ,

Petitioner,

—v.—

STATE OF FLORIDA DEPARTMENT OF PROFESSIONAL REGULATION, BOARD OF ACCOUNTANCY,

Respondent.

ON WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA FOR THE FIRST DISTRICT

BRIEF OF THE AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Is the Florida Board of Accountancy's regulation of Petitioner's use of "CPA" after her name, when Petitioner refuses to comply with regulations applicable to those holding themselves out as CPAs, a constitutionally permissible exercise of the state's regulatory power?

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BRIEF OF THE AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

PRELIMINARY STATEMENT

Pursuant to Rule 37.3 of the Rules of the Court, the American Institute of Certified Public Accountants (the "Institute") respectfully submits this brief as *amicus curiae* in support of the Respondent, State of Florida Department of Business and Professional Regulation, Board of Accountancy, with the written consent of the parties, filed herewith.

INTEREST OF THE INSTITUTE AS *AMICUS CURIAE*

The Institute is the national professional accounting organization, all of whose more than 312,000 members are certified public accountants ("CPAs"). The Institute's members provide accounting services to the public as sole practitioners and through firms and businesses of all sizes. The Institute's service to the public spans more than 100 years.

Among the Institute's purposes are the promotion and maintenance of high professional standards of practice. In pursuit of these ends, the Institute has been a principal force in developing accounting, auditing, and ethical standards that govern the provision of various types of services by CPAs.

This Court has recognized that public accounting is a highly skilled and technical profession, imbued with a distinctive public interest, and subject to substantial regulatory authority on the part of the states. Since 1896, when statutory recognition of CPAs was first adopted in New York, laws have been enacted in each state establishing state boards of accountancy, vested with the power and responsibility to examine, license, and regulate the practice of public accountancy. The Institute as well has promulgated ongoing regulatory requirements applicable to members who perform for a client accounting services and who hold themselves out as CPAs. One goal of this regulatory regime is to ensure that a member of the public, upon engaging the services of a CPA, can be confident that the CPA has satisfied, and continues to satisfy, regulatory requirements.

The Institute respectfully submits this brief in support of the Respondent's important authority to protect against the false and misleading use of "CPA" by those who do not adhere to this regulatory regime, and to ensure the integrity of the designation "CPA" as a hallmark distinguishing between

those accountants who accept such regulation and those who do not.

STATEMENT OF THE CASE

The practice of public accountancy in Florida has been regulated by the state for more than fifty years. Presently governed by chapter 473 of the Florida Statutes, it arose out of "a public need for independent and objective public accountants" and a state interest in protecting "the public from dishonest practitioners." Fla. Stat. ch. 473.301 (1991). Chapter 473 is administered by the Florida Department of Business and Professional Regulation, which encompasses the Board of Accountancy (the "Board"). *See* Fla. Stat. ch. 473.303-04 (Supp. 1994).

Among other things, chapter 473 provides for state licensing of CPAs. It provides that, to become a CPA in Florida, an individual must pass a rigorous examination, be of good moral character, and meet stringent educational requirements. Fla. Stat. ch. 473.306-08. The remainder of chapter 473 sets forth regulations governing the ongoing practice of state-licensed CPAs, including continuing education requirements, independence and technical standards, standards pertaining to advertising, other rules designed to assure objectivity (like restrictions on competitive bidding and acceptance of commissions), and disciplinary standards. *See, e.g.*, Fla. Stat. chs. 473.309-12, 473.315, 473.317, 473.319-24.

Chapter 473 applies to those persons who are engaged in the "practice of public accountancy." While individuals who are not CPAs may perform some accounting functions without being subject to the full panoply of state regulatory requirements, chapter 473 defines the "practice of public accountancy" in substance to involve two separate elements: (1) the performance of accounting services for the public (or offering to do so); and (2) holding oneself out as a certified pub-

lic accountant.[1] Fla. Stat. ch. 473.302(4). Where one both performs accounting services for the public, and holds oneself out as a certified public accountant, he or she is engaged in the "practice of public accountancy" and subject to state regulatory requirements.

Silvia Ibanez is such a person. A practicing attorney and a member of the Florida bar, she is also a Florida certified public accountant. She is the sole shareholder and employee of her firm, Silvia S. Ibanez, P.A., and advertises herself, on her business cards and in the telephone directory, as a "CPA." Though admittedly holding herself out as CPA, she has declined to comply with applicable state CPA regulations. At a minimum, she has refused to have her firm licensed by the

[1] The "practice of public accountancy" is defined by the State of Florida as:

> (a) Offering to perform or performing for the public one or more types of services involving the use of accounting skills, or one or more types of management advisory or consulting services, by a certified public account, or firm of certified public accountants, of this state, including the performance of such services in the employ of another person; or
>
> (b) Offering to perform or performing for the public one or more types of services involving the use of accounting skills, or one or more types of management advisory or consulting services, by any other person holding himself or itself out as a certified public accountant or a firm of certified public accountants, including the performance of such services by a certified public accountant in the employ of a person so holding himself or itself out. . . .

Fla. Stat. ch. 473.302(4) (presently 473.302(5) (Supp. 1994)). Excluded from the practice of public accountancy are: "(3) Activities of licensees who do not hold themselves out as certified public accountants." Fla. Admin. Code Ann. r. 21A-20.011 (presently 61H1-20.011 (1993)). Florida Administrative Code rule 21A-20.012 (presently 61H1-20.012 (1993)), which defines the term "holding out" contained in section 473.302(4), was declared invalid. *See Ibanez v. State Bd. of Accountancy*, DOAH Case No. 91-3336R, opinion rendered Jan. 15, 1992. The Board's Final Order in this case did not rely upon this rule, finding that Petitioner's conduct violated provisions of chapter 473 and other applicable rules.

state. The record is unclear as to the extent to which she is in noncompliance with other CPA regulations.

On June 13, 1991 (and as modified on August 22, 1991), the Department of Professional Regulation charged Ms. Ibanez with, *inter alia*, advertising in a false and deceptive manner while engaging in the practice of public accountancy, in violation of sections 473.323(1)(f), (g), and (h) of the Florida Statutes, and rule 21A-24.001 of the Florida Administrative Code. Petitioner argued that her ability to advertise as a CPA, notwithstanding her unwillingness to comply with applicable regulations, was protected by the First Amendment. Following a formal hearing, which included live testimony by witnesses on both sides, the Board found that Petitioner had committed a violation of the Florida Statutes. The Board found that Petitioner was engaged in the "practice of public accountancy" and that she was in noncompliance with the state's regulation of those engaged in the "practice of public accountancy" insofar as she had failed to have her firm licensed. Thus, the Board concluded, Petitioner's advertising of her CPA credential without complying with the provisions of chapter 473 was deceiving and misleading to the public. The Board rejected Petitioner's First Amendment argument, finding that the state's regulation of the "CPA" designation was a constitutionally permissible exercise of its power to regulate the practice of public accountancy. The Florida First District Court of Appeal affirmed.

SUMMARY OF ARGUMENT

While Petitioner's possession of a CPA certificate, by itself, is verifiable and true, her promotional use of the designation connotes and implies her compliance with Florida's regulatory regime governing CPAs. This use of the CPA designation while she simultaneously refuses to comply with applicable regulations is misleading. There is no validity in her claim that, as applied to her in these circumstances, Florida's pro-

hibition of this misleading use of the CPA credential violates the First Amendment.

This Court has consistently held that false and misleading commercial speech is not protected by the First Amendment. The Court has also recognized that otherwise verifiable commercial speech can be potentially misleading and thus subject to appropriate regulation. Such speech is at issue here. More, the potential for deception was, on this record, realized by Petitioner. In holding herself out to the public as a CPA, she implicitly claimed to recognize, accept, and comply with the regulations of Florida that conditioned her continued right to practice as a CPA. That was not the case, and her implicit representation is beyond any First Amendment protection.

Petitioner's commercial speech also may be regulated by the state as a result of the state's substantial interests in ensuring conformity to high standards of practice and in drawing, for the public, a bright-line distinction between those who are willing to comply with applicable standards and those who are not. Those interests are directly advanced by regulating use of the "CPA" designation, and the state should be permitted to curtail the use of that designation by those who are not willing to conform to professional standards specifically applicable to those holding themselves out as CPAs.

ARGUMENT

I. HOLDING ONESELF OUT AS A CPA, WHILE KNOWINGLY REFUSING TO COMPLY WITH THE REGULATIONS SPECIFICALLY APPLICABLE THERETO, IS FALSE AND MISLEADING AND NOT PROTECTED BY THE FIRST AMENDMENT.

The designation "CPA" that is the crux of this case has accumulated over time certain well-understood connotations. Among the most important of those is the implied assertion that the holder of the designation possesses an established

level of professional competence and adheres to a system of professional regulation designed to ensure continued high standards of proficiency and ethics. Where, as here, a CPA refuses to adhere to that ethical regime, her promotional use of the CPA credential invites the public to draw an inference that is not true; her use of the credential in this way and to this extent is misleading.

That misleading use is all that Florida denied to Petitioner. This case, therefore, presents neither a total ban on the use of the CPA credential because of its potential for misuse nor a facial challenge to Florida's regulation in all of its possible applications. It is a challenge narrowly to Florida's power to curtail the misleading use of a content-laden credential by one who is actually using it in that misleading way. This authority to regulate with particularity demonstrably misleading commercial speech is well within the constitutional power of the state, as the Court's authorities have defined that power. *See, e.g., Peel v. Attorney Registration & Disciplinary Comm'n of Illinois*, 496 U.S. 91 (1990); *In re R.M.J.*, 455 U.S. 191, 207 (1982); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York*, 447 U.S. 557, 562 (1980); *Bates v. State Bar of Arizona*, 433 U.S. 350, 364 (1977); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976).

This Court has explicitly noted "the 'commonsense' distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech." *Central Hudson*, 447 U.S. at 562, *quoting Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455-56 (1978). The Court has recognized, accordingly, that, "The Constitution . . . accords a lesser protection to commercial speech than to other constitutionally guaranteed expression." *Central Hudson*, 447 U.S. at 562-63.

A well recognized qualification on the First Amendment right to disseminate commercial information involves speech

that is false and misleading. The Court has unequivocally and consistently held that "there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity." *Central Hudson*, 447 U.S. at 564; *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974). As the Court stated in *Virginia State Bd. of Pharmacy*:

> Obviously, much commercial speech is not probably false, or even wholly false, but only deceptive or misleading. We foresee no obstacle to a State's dealing effectively with this problem. The First Amendment, as we construe it today, does not prohibit the State from insuring that the stream of commercial information flow cleanly as well as freely.

425 U.S. at 771. When faced with false and misleading speech, a state may constitutionally impose a total ban. The state "may ban forms of communication more likely to deceive the public than to inform it." *Central Hudson*, 447 U.S. at 563; *Friedman v. Rogers*, 440 U.S. 1, 13, 15-16 (1979).

At issue in the present case is *not* such a "total ban." Petitioner is welcome to advertise herself as a "CPA." What is at issue here is whether she may advertise herself as a CPA while, at the same time, failing to recognize the authority of—indeed essentially disavowing—state regulations that govern the licensure and practice of CPAs. The Board and the Florida First District Court of Appeal ruled that she may not. Under the Court's cases, it is clear that the First Amendment does not entitle an accountant to promote herself to the public as a duly licensed and authorized CPA, while, at the same time, she deliberately declines to subject her practice to the professional regulations applicable to CPAs. Her behavior in this respect renders her implicit representation false and misleading, and unprotected by the First Amendment.

Certainly the commonsense interpretation by the public of a professional credential—whether it be "CPA," "M.D.," "D.D.S.," "Attorney-at-Law," or other such professional designation—is that the professional has both met the threshold requirements to practice and is subject to the regulatory protections uniformly applied to members of that profession. The relevant information that makes a contribution to informed consumer decision-making includes the implied assertion that the professional adheres to the standards her profession proclaims. Such professional designations, and the ability of the public to place reliance upon them, are thus fundamental to the purposes they seek to fulfill: communication of pertinent information about a professional to potential users of her services, and protection of the public as to the professional's practice in a field that is, by its nature, beyond the knowledge, skill, and understanding of the average person.

Beyond a commonsense understanding, the public may also be expected to be aware that state law, such as the Florida law applicable here, explicitly subjects those practicing in regulated professions not only to licensure requirements, but to ongoing regulation. In the case of CPAs, those regulations require adherence to standards of independence, integrity, and objectivity, certain restrictions on fee arrangements, participation in continuing education programs, and other competence and technical standards. *See, e.g.*, Fla. Admin. Code Ann. rs. 61H1-21, 61H1-22; Fla. Stat. chs. 473.312, 473.319, 473.3205. Holding oneself out as a CPA implicitly represents adherence to these ongoing regulations, because such adherence is what the law specifically requires.

Without specifically addressing the issue, members of the Court have assumed, as the underpinning of earlier decisions, that advertisement as a licensed professional carries with it this suggestion of compliance with ongoing regulatory responsibilities. Justice Stevens, writing the plurality opinion in *Peel v. Attorney Registration & Disciplinary Comm'n*, 496 U.S. 91 (1990), examined a dictionary definition of the word

"certificate" for the "common understanding" that certification implies that one "has attained professional standing in a given field *and* may officially practice or hold a position in that field." *Id.* at 104, *quoting Webster's Third New International Dictionary* at 367 (1986 ed.) (emphasis deleted and added). Justice O'Connor, while addressing a separate subject in *Peel*, referred to it as "common knowledge" that "States police the ethical standards of the profession." *Id.* at 123-24 (O'Connor, J., dissenting). Justice Marshall, concurring in that same case, referred to a definition of "certified public accountant" as an accountant "in professional public practice who has met the requirements of a state law." *Id.* at 113 (Marshall, J., concurring). Indeed, it was the existence of "high professional standards" that were "guaranteed by the close regulation to which pharmacists in Virginia are subject" that the Court said it relied upon when it first extended constitutional protection to the commercial speech of professionals. *Virginia State Bd. of Pharmacy*, 425 U.S. at 768; *see Bates v. State Bar of Arizona*, 433 U.S. 350, 365 (1977).

The basic point is that one who holds herself out as a member of a regulated profession, as a matter of common understanding and as a matter of law, implicitly represents that she is subject to, and in compliance with, ongoing state regulatory requirements and, when that is not so, her representation is deceptive. Where, as here, the possibility of such deception is self-evident, the state need not survey the public for factual support in order to sustain a curtailment of the deceptive speech. *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 652-53 (1985); *Accountant's Soc'y of Virginia v. Bowman*, 860 F. 2d 602, 606 (4th Cir. 1988) ("the Board was not required to make an elaborate evidentiary showing at trial in order to establish the misleading nature" of the use of the appellation "public accountant").

But while such a factual record is unnecessary, it is present here. There is specific evidence in this case, found by the

Board to be clear and convincing, that use of "CPA" implicitly creates the expectation of conformity to ongoing accountancy regulations. Before the Board, Dean Dennison, an expert in public accounting, testified:

> In my opinion, the use of the term [CPA] implies additional competence. If the public that's out there being served identifies a service or received a service, advice, counsel, whatever, from a person who does hold themselves out as a CPA, I think they have a right to expect that they [the CPA] would be disciplined and subject to the chapters that govern any CPA that holds themselves out.
>
> If the individual totally disassociates himself, even though he may keep his credentials current, if he or she disassociates herself with the identification of a CPA and they are there doing those other business activities and the public has no reason to believe that they are in any way holding themselves out, then I think the public doesn't have the same expectation for that person who has not held themselves out as a CPA, therefore they are not expecting any more competency than anybody else, no matter what their licensure may be.

(R. 659-60.) Another witness, more representative of the public, testified that she would believe Petitioner here was performing both legal and CPA services, based on her advertisement. (R. 1228-29, J.A. 155.) The record thus bears out the understanding dictated by commonsense and by the Court's prior analysis and demonstrates the misleading nature of Petitioner's speech in this case.

All this is consistent with the strong misgivings this Court has previously expressed about the potentially misleading nature of professional "certifications," even where the professional was unquestionably in full compliance with the requirements at issue. In *Peel*, the Court wrestled with the issue whether an attorney could advertise on his letterhead

that he was "certified" as a civil trial specialist by the National Board of Trial Advocacy. 496 U.S. at 93-94. Unlike this case, there was absolutely no suggestion that the attorney was not in full compliance with applicable requirements; even so, as Justice White pointed out in dissent, "there are five Justices who believe that this particular letterhead is unprotected":

> [T]here are five Justices who believe that this particular letterhead is unprotected: Justice O'Connor, the Chief Justice, and Justice Scalia believe the letterhead is inherently misleading and hence would uphold Rule 2-105(a)(3) . . . ; at least two of us—Justice Marshall and myself—find it potentially misleading and would permit the State to ban such letterheads but only if they are not accompanied by disclaimers appropriate to avoid the danger. This letterhead does not carry such a disclaimer. The upshot is that while the State may not apply its flat ban to any and all claims of certification by attorneys, particularly those carrying disclaimers, the State should be allowed to apply its Rule to the letterhead in its present form and forbid its circulation.

Id. at 118.

Apparently what saved the "certification" on the letterhead in *Peel* was the fact that the state in that case had gone too far in enacting a "total ban." *Id.* at 111 (Marshall, J., concurring). There is no "total ban" at issue here. Petitioner is welcome to use the CPA appellation if she is willing to comply with state regulations applicable to those who hold themselves out as CPAs. Only her unwillingness so to comply drives her to resort to the First Amendment.

This situation is analogous to that encountered by the Fourth Circuit in *Accountant's Soc'y of Virginia v. Bowman*, 860 F.2d 602 (4th Cir. 1988). In that case, the Fourth Circuit addressed the constitutionality of a Virginia statute which,

like the Florida statute here, imposed restrictions on holding oneself out as a certified public accountant. Similar to Petitioner, a group of accountants who had not met the requirements of licensure argued that the statute unconstitutionally abridged their First Amendment freedom of speech. The Fourth Circuit disagreed. Relying upon precedent of this Court, the Fourth Circuit explained:

> The state has an interest in assuring the public that only persons who have demonstrated their qualifications as certified public accountants and received a license can hold themselves out as certified public accountants. The Supreme Court has held that "advertising for professional services" may be prohibited "when the particular content or method of the advertising suggests that it is inherently misleading or when experience has proved that in fact such advertising is subject to abuse."

Id. at 605, *quoting In re R.M.J.*, 455 U.S. 191, 203 (1982).

The Institute is well aware of the argument made by the Alliance of Practicing Certified Public Accountants (the "Alliance") and certain others, as *amici curiae*, that there allegedly is nothing misleading in Petitioner's suggestion that she is "subject to the Board's regulatory oversight" because such a statement is supposedly verifiable and correct. They argue that "if consumers assume Mrs. Ibanez is subject to the Board's regulatory oversight, they will be correct." (Alliance Br. at 22.) What these *amici* fail to make clear, however, is that, while she may admit to being "subject to" regulatory oversight, Petitioner also takes the position that she does not have to comply with it. And, no matter how strenuously these *amici* attempt to defend it, it is inherently misleading to advertise oneself as "regulated" when, in fact, one also takes the position that she need not comply with the regulations.

In sum, although she was in knowing disregard of regulations applicable to CPAs, Petitioner nevertheless, by offering

accounting services and displaying the CPA credential, represented to the public that she was a CPA who had agreed to be subject to the state's rules applicable thereto. That was false and misleading. Her ability to hold herself out as a regulated professional, while simultaneously taking the position that she need not comply with applicable regulations, is not, and should not be, protected by the First Amendment.

II. THE STATE HAS A SUBSTANTIAL INTEREST THAT IS DIRECTLY ADVANCED BY THE LIMITATION OF THE "CPA" DESIGNATION TO THOSE WILLING TO CONFORM TO PROFESSIONAL REGULATIONS.

Beyond its interest in prohibiting the false and misleading use of the CPA appellation, the state has further interests served by the limitation upon those who may hold themselves out as CPAs: ensuring compliance with its accountancy regulations while drawing a bright-line distinction, clear to the public, between those accountants who are subject to the state's regulatory regime and those who are not. These interests have led to regulatory regimes that rely upon the "holding out" mechanism to distinguish among those who will be subject to regulation and those who will not.[2] The Institute's Code of Professional Conduct similarly utilizes such a provision.[3] Absent a restraint on the use of "CPA," regulatory regimes would suffer and the potential for confusion to the public would be great. The state's interest is therefore substantial and is directly advanced by the regulation at issue, which is in reasonable proportion to the interest served.

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[2] *See, e.g.*, Mass. Gen. Laws Ann. ch. 112, §§ 87A-D (West 1991); N.D. Cent. Code § 43-02.2 *et seq.* (1993); Tex. Rev. Civ. Stat. Ann. art. 41a-1 *et seq.* (Supp. 1993).

[3] *See* Code of Professional Conduct of the American Institute of Certified Public Accountants, Rule 92.09 (1993).

In *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York*, the Court set forth a three-factor test, since held applicable to accountancy regulations, governing the permissibility of state restraints on truthful commercial speech. 447 U.S. 557, 566 (1980); *see Edenfield v. Fane*, 113 S. Ct. 1792, 1798 (1993). That test presently involves the assessment whether: (1) the asserted governmental interest is substantial; (2) the regulation directly advances the governmental interest asserted; and (3) the regulation is in reasonable proportion to the interest served. *Central Hudson*, 447 U.S. at 566; *see Board of Trustees of the State Univ. of New York v. Fox*, 492 U.S. 469, 480 (1989). Assessment of those factors here demonstrates the constitutional permissibility of the Board's limitation on who may hold themselves out as CPAs.

As to the first factor, the Court has already recognized the substantial interest of the state in regulating the practice of public accountancy and in ensuring conformity to the highest standards of ethics and professionalism. More than once, the Court has emphasized the overriding importance to the public and financial markets that "the accountant maintain total independence from the client at all times" and the extent to which the practice of public accountancy "requires complete fidelity to the public trust." *United States v. Arthur Young & Co.*, 465 U.S. 805, 818 (1984); *see Fane*, 113 S. Ct. at 1800.

The Court has emphasized generally "the State's important interests in maintaining standards of ethical conduct in the licensed professions." *Fane*, 113 S. Ct. at 1800; *see Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 460 (1978). Maintaining standards of ethical conduct, and, in particular, ensuring "total independence" and "complete fidelity to the public trust," are the fundamental premises underlying state accountancy regulations. *See, e.g.*, Fla. Stat. ch. 473.301 ("The Legislature recognizes . . . [the] public need for independent and objective public accountants and that it is necessary to regulate the practice of public accounting"). As the Court found

just last term, a board of accountancy's interest in ensuring compliance with these standards, under the *Central Hudson* test, is "substantial":

> With regard to CPAs, we have observed that they must "maintain total independence" and act with "complete fidelity to the public trust" when serving as independent auditors. *United States v. Arthur Young & Co.*, 465 U.S. 805, 818, 104 S.Ct. 1495, 1503, 79 L.Ed.2d 826 (1984). Although the State's interest in obscuring the commercial nature of public accounting practice is open to doubt, *see Bates v. Arizona State Bar Assn.*, 433 U.S., at 369-71, 97 S.Ct., at 2701-2703, the Board's asserted interest in maintaining CPA independence and ensuring against conflicts of interest is not. We acknowledge that this interest is substantial.

Fane, 113 S. Ct. at 1800.

The protection of this substantial interest in maintaining standards of professional skill and ethical behavior gives rise to a second, related substantial interest which the state is entitled to protect: the undiluted and consistent character of the CPA designation as a hallmark distinguishing those practitioners who adhere to those standards from those who do not.

The plurality opinion in *Peel* is instructive on this point. There, the Justices joining in the opinion recognized that some consumers would draw inferences about Peel's qualifications from the certification he used, but concluded that the certification was not inherently misleading because the organization conferring it was demonstrably genuine and its uniform standards were demonstrably rigorous and, in fact, complied with. The opinion noted that the certification's implied representation of its possessor's qualifications was, "[m]uch like a trademark, . . . measured by the quality of the organization for which it stands," and that quality was in turn inferable from "an evaluation of its rigorous requirements." 496 U.S. at 102.

So here. The CPA designation is conferred by state authority upon those who adhere to its uniformly applied, consistently maintained, ascertainably rigorous standards. The strength of that certification, also like a trademark, would be diluted not only by the absence of rigorous standards for its use in the first place, but also by an inability to police its use and confine that use to those who meet the rigorous standards. If Peel could have used his NBTA certification, backed as it was by rigorous standards, without complying with them, his case would have taken on a quite different complexion.

Nor does it matter that Petitioner, at the moment, apparently chooses not to offer the attest services which are central to the CPA's role and most conspicuously implicate the duties of independence and fidelity to the public trust. This is true for at least three reasons. First, other obligations properly within the ambit of state regulation—for example, the duty to avoid conflicts of interest—subsist outside the attest context and have been recognized as substantial. *Fane*, 113 S. Ct. at 1800. Second, as a matter of law, the Court has recognized that the idiosyncracies of a litigant's particular situation do not defeat the state's interest. Last term, in its most recent commercial speech case, the Court held that, given the state's " 'strong interest in adopting and enforcing rules of conduct designed to protect the public' . . . the State was entitled to protect its interest by applying a prophylactic rule to those circumstances generally." *United States v. Edge Broadcasting Co.*, 113 S. Ct. 2696, 2706 (1993), *quoting Ohralik*, 436 U.S. at 464. Similarly here; Florida's strong interests in protecting professional standards and the CPA designation as a badge of adherence to them are unaffected by the present specifics of Petitioner's practice.

Third, and most fundamentally, it is necessary for the state to protect the undiluted quality of the CPA hallmark—even when used by non-attesting practitioners—because it protects the profession's single reputation for skill, independence, and objectivity. That reputation makes it possible for CPAs to pro-

vide a differentiated service in the marketplace for financial services and it is in the public's interest that this alternative be both available and distinctively communicated to consumers.

The distinctiveness and integrity of the CPA hallmark is instrumental in procuring adherence to the regime of professional standards enacted for the public's benefit. It is likely that the willingness of many accountants to subject themselves to the rigorous regulations governing the practice of public accountancy arises out of the resulting ability to employ the CPA hallmark and to benefit from the reputation for skill and ethics that it communicates. When they use that hallmark, accountants hold themselves out to the public as persons who not only perform accounting functions, but also satisfy the specified standards of practice and who maintain fidelity to the ongoing responsibilities that accompany that professional designation. The public, in turn, can be confident that, if one engages a CPA, he or she is obtaining the services of an accountant who is committed to standards embodying the highest levels of competence, ethics, and professional conduct as defined by the state.

If a state may not limit those who may hold themselves out as CPAs to those who comply with applicable regulations, the foundations of this regulatory regime largely collapse. The value of the CPA hallmark would be seriously impaired. There would be a correspondingly diminished incentive to comply with ongoing professional requirements that impose cost and burden on the professional. There would be reduced incentive to conform to ethical standards; there would be reduced incentive to participate in continuing professional education programs; there would be reduced incentive to open one's practice to periodic inspection by competitors through the "peer review" process implemented by the profession. If an accountant could, without compliance, hold herself out as a "CPA," there would be reduced incentive to subject oneself to any of this.

The result, of course, would be the elimination of the centerpiece of the regulatory regime and the diminishing of fidelity to the standards of the profession (as we see in this case). That outcome would also eliminate the bright-line distinction, readily available to the public, differentiating those who are committed to compliance with applicable regulations from those who are not, and separating those who may conscript for their commercial use the profession's reputation for ethical behavior from those who cannot. While the profit-maximizing strategies of some accountants might thereby be served, there is surely one group that would not be: the public.

Florida, therefore, has a substantial interest both in upholding the standards of proficiency and ethics of the CPA profession and in protecting the hallmark of those qualities that it confers from dilution and misuse. Both of these interests are directly advanced by a regulation that curtails the ability of a non-complying practitioner to promote her business by use of the CPA designation. The second factor of *Central Hudson* is thus amply satisfied here.

As to the final factor of *Central Hudson*, the restraint upon use of "CPA" is narrowly drawn to be in reasonable proportion to the substantial interest served. 447 U.S. at 566; *see Fox*, 492 U.S. at 480. As the Court has held, laws restricting commercial speech, "unlike laws burdening other forms of protected expression, need only be tailored in a reasonable manner to serve a substantial state interest in order to survive First Amendment scrutiny." *Fane*, 113 S. Ct. at 1798; *see Fox*, 492 U.S. at 480. In applying this standard, the Court has been especially sensitive to the particular risks attendant to advertising for professional services:

> The public's comparative lack of knowledge, the limited ability of the professions to police themselves, and the absence of any standardization in the "product" renders advertising for professional services especially suscep-

tible to abuses that States have a legitimate interest in controlling.

In re R.M.J., 455 U.S. 191, 202 (1982); *see also Virginia State Bd. of Pharmacy*, 425 U.S. at 773. The limitation here is a precise and reasonable intrusion upon the speech of those practicing public accountancy aimed directly at protecting interests the state is entitled to advance. The "holding out" mechanism is meant to sort out accurately who does and who does not submit to accountancy regulations and to inform the public reliably about the difference.

The narrowness of the limitation at issue is illustrated by what it does not seek to do, particularly when it is contrasted with commercial speech restraints that have been addressed by the Court. The limitation here does not, for example, place a "total ban" on the commercial speech at issue. *E.g.*, *Fane*, 113 S. Ct. at 1800; *Peel*, 496 U.S. at 111; *In re R.M.J.*, 455 U.S. at 202; *Central Hudson*, 447 U.S. at 562. The limitation here does not seek to discriminate between different forms of speech based upon their substantive content. *E.g.*, *Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505, 1517 (1993). The limitation here does not seek to curtail a form of speech where the proper remedy is "more speech." *E.g.*, *Linmark Assocs. v. Township of Willingboro*, 431 U.S. 85, 97 (1977). The limitation here does not seek to curtail speech based on the speech's "primary effect"—the effect of the speech when those who receive the information act upon it. *E.g.*, *id.*; *Virginia State Bd. of Pharmacy*, 425 U.S. at 766-70. The limitation here does not seek to protect the public by keeping it in ignorance. *E.g.*, *Bates*, 433 U.S. at 365; *Virginia State Bd. of Pharmacy*, 425 U.S. at 769.

Rather, the limitation at issue here—like truth-in-labeling—seeks only to enhance the conveyance of meaningful and consistent information to the public as to what the designation "CPA" does, and does not, mean. It respects the public's right to make its own informed decision, and seeks only to establish a uniform nomenclature so the public can make just such a decision.

The regulations at issue are thus directed to substantial interests that the state is entitled to protect, specifically advance those interests, are narrowly drawn, studiously avoid the impermissible forms of restraint the Court has historically invalidated, and arise in a context which, the Court has recognized, is particularly vulnerable to the risk of public confusion. Florida's restriction of the right to hold oneself out as a "CPA" to those willing to comply with its regulatory requirements governing the practice of public accountancy should therefore be upheld.

CONCLUSION

For the foregoing reasons, the American Institute of Certified Public Accountants respectfully requests that the judgment of the First District Court of Appeal of Florida be affirmed.

Respectfully submitted,

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